insurance, the doctrine of subrogation still applies and the insurer may require the insured to take an action against the wrong-doer for the recovery of all the damages flowing from the latter's negligence. The insured's own interest in the action may be limited to the first part of the damage claim which he had to pay under the excess clause or to the excess of his personal injury claims over what he had been paid by the insurer. If the action succeeds and he recovers a sum in settlement of his claims, he is bound to refund to the insurer what his insurer had paid to him under the policy of insurance. If the wrong-doer was himself covered by a policy of insurance, the existence of a knock for knock agreement between the insurers of the plaintiff and the wrong-doer did not deprive the plaintiff of his right of action against the defendant for the full amount of the damage that he had sustained, though he would also be under a duty to hand over to his insurer that part of the total damages recovered for which he had already been indemnified by it: *Morley* v. *Moore*[3] approved in *Hobbs* v. *Marlowe, supra.*

It is quite clear that the 1st respondent's claim against the appellants was not the concern of any insurers of the appellant and it is not easy to see how *Morley* v. *Moore* came to be considered in the High Court. But under the doctrine of subrogation the claim of the 1st respondent against the appellants though brought by the insurer was to adopt the word used, maintainable.

The reasoning behind the appellants' contention that the doctrine of subrogation did not apply was not so clearly shown as to make it apparent. But Lord Diplock in the case of *Hobbs* v. *Marlowe, supra,* prefers "to regard the doctrine of subrogation in relation to contracts of insurance as having its origin at common law in the implied terms of the contract and calling for the aid of a court of equity only where its auxiliary jurisdiction was needed to compel the assured to lend his name to the insurer for the enforcement of rights and remedies to which his insurer was subrogated: see *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.*[4] "No need however arises to bring in equity as the policy of insurance in this case, like most standard forms of motor insurance, contained express provisions reserving the right to the insurer "to take over and conduct in his name the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise...." It is a matter of express contractual provisions.

The central argument of the appellants against the judgment in favour of the 1st respondent therefore fails and the appeal must be dismissed with costs.

As for the appeal against the dismissal of the 3rd party action against the 2nd respondent, the 2nd respondent's counsel rather surprisingly commenced by supporting the submission of counsel for the appellants. But it is an appeal against the decision that the appellants had no case against him. Both the Senior President and the judge thought so. It is a strange case and not at all common. But for ourselves, we can see no reason why the employer who had suffered damages by the negligence of the servant should not at common law and on the general principle of "*ubi jus ibi remedium*" begin this action. What joy the appellants could get out of a judgment against a person whose financial standing drove him to take this lowly employment is not a matter of concern but the admitted negligence of the 2nd respondent must mean that the appeal against the dismissal of the third party action against the 2nd respondent succeeds. The appellants shall have the costs of this part of the appeal.

Order accordingly.

Solicitors: *Skrine & Co.; Gill & Tang.*

SYARIKAT BUNGA RAYA TIMOR JAUH SDN. BHD. & ANOR. v. TRACTORS MALAYSIA BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 13 & April 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 82 of 1979]

Practice and Procedure — Application for summary judgment — Application granted in High Court — Application for stay of execution — Whether Federal Court can deal with substantive appeal — Substantive question to be tried — Leave to defend — Federal Court (Civil Appeals) (Transitional) Rules 1963, rr. 9 & 25 — R.S.C. 1957, O. 14.

Commercial Transactions — Lease of machinery — Whether lease in fact hire-purchase agreement — Option to purchase given by letter — Claim for rentals — Hire-Purchase Act, 1978.

Evidence — Written agreement — Evidence to vary written agreement — Evidence Act, 1950, ss. 92 & 95.

In this case the respondents by nine agreements in writing leased to the appellants certain expensive machinery. In respect of three of the agreements there were letters which gave the appellants an option to purchase. The appellants fall into arrears of the payment of the rentals and the respondents resumed possession of the machinery and then sued for arrears of rentals. The respondents applied for summary judgment but the appellants contended that the agreements were in reality hire-purchase agreements and were void for non-compliance with the Hire-Purchase Act, 1978. The Senior Assistant Registrar gave leave to defend but, on appeal, the Judge allowed the application for summary judgment. The appellants appealed.

Held: (1) in respect of the three agreements in respect of which there were letters referring to an option to purchase, there were triable issues and leave to defend should be given;

(2) leave to sign final judgment in respect of the machinery in the remaining leasing agreements should be upheld.

Cases referred to:-

(1) *Mohd. Mustafa s/o Seeni Mohd.* v. *Kandasami s/o Kaliappa Gounder* [1979] 2 M.L.J. 109.

(2) *Demuren* v. *Seal Estates* [1979] S.J. 222; 249 E.G. 440.

(3) *Rossvale* v. *Green* [1979] S.J. 610; 250 E.G. 1183.

(4) *Aldrington Garages* v. *Fielder* (1978) 247 E.G. 557.

(5) *Tan Chin Kim Sawmill Factory Sdn. Bhd. & Anor.* v. *Lindeteves-Jacoberg (M) Sdn. Bhd. & Anor.* [1980] 2 M.L.J. 204.

(6) *Diamond Peak Sdn. Bhd. & Anor.* v. *Tweedie F.C.* [1980] 2 M.L.J. 31.

FEDERAL COURT.

V.C. George (*K.S. Narayanan* with him) for the appellants.

Wong Chong Wah for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): In the course of hearing an urgent application for stay of execution, it occurred to us that a much more satisfactory course in the circumstances of this case would be to hear the substantive appeal itself and though this would not make available to us the undoubted advantages of knowing the learned judge's grounds of decision, we formed the opinion that in an Order 14 application which this proceeding was, nothing really turned on the credibility of witnesses and no real obstacle presented itself to the course we proposed to take. Apart from our inherent jurisdiction, Rule 25 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 enables the appeal to be heard in such conditions.

By nine agreements in writing, called Equipment Leasing Agreements, all in identical form save as to the dates, the amounts and the objects of the leases, the respondents leased on various dates between September 2, 1975 and June 1976 certain very expensive machinery at substantial rentals, all in excess of $7,000 odd per month, for a period of 30 months commencing from the dates of the agreements. *Ex facie*, the agreements were exactly what they were said to be — leasing agreements of chattels or contracts of bailment with no element of sale. Under these agreements, the appellants as lessees had no interest that could be seized by way of execution and there could be no question of any assignment or mortgage of an option to purchase. And if they purported to assign any proprietary rights in the machinery or otherwise deal with the objects of lease as owners, or "do or permit any act likely to endanger the safety or condition of the goods or prejudice or jeopardise the lessor's ownership of the goods" (clause 18(f)), the respondents as lessors would become entitled to immediate possession and to terminate the leases. The lessees were also not entitled, as under a hire-purchase agreement, in the absence of any provisions of this effect, to sub-hire them. Clause 19(i) refers to expiration or other determination of the lease and it is reasonably clear that the expiration refers to termination by effluxion of time and the "other determination" to the exercise of the lessors' rights arising upon any breach or breaches of the terms and conditions of the lease on the part of the lessees.

Clause 19(ii) reads:

"(ii) Upon the determination of the lease (other than by effluxion of time) the lessee shall pay the lessor:—

(a) any arrears of rentals accrued as at the date of termination;

(b) any sums other than rentals which may become payable under the agreement;

(c) any expenses incurred by the lessor in tracing and/or recovering possession of the goods or in enforcing the provisions of this lease;

(d) an amount equal to the unpaid rentals for the remainder of the period of this lease."

In each leasing, the 2nd appellants executed a document termed a Guarantee and Indemnity to guarantee the due payment of all sums of money due from the lessees to the lessors and to indemnify the lessors against all losses, damages, costs and expenses.

Each lease was consensually varied as to the terms and the amounts of the payment. Whereas in the lease agreements, the total amount of the hiring charges was expressed in one lump sum to be paid by equal monthly parts for the period of the hire, with a leftover residual value of only $1, the lump sum, decreased, in part, by the hire-rents hitherto paid, (i) was now further diminished by a certain rebate, (ii) then had added on to it accrued interest, (iii) and again was diminished by a more substantial residual value, (iv) and lastly increased by an amount termed hiring charges. The net amount became the total rent for the period of the hire, now increased to 36 months from the date of the variation and the monthly instalment of rent is one-thirty-sixth of this total rent. One of the results of this variation was that the monthly hire was, in actual figures, reduced from some $7,000 odd to some $5,000 though it had to be borne in mind that the rents for the period that had elapsed before the variation took effect had been paid and had to be taken into consideration and the period of the hire was longer.

We were not advised of the significance in each case of this variation, but Mr. Wong Chong Wah for the respondents read to us a passage from T.M. Clark's Leasing (1978) published by McGraw-Hill Limited to the effect that there is no significance in the residual value and that this is nothing more or less than a book-keeping device to keep the books of the lessors in order. *Goode* on Hire Purchase Law and Procedure (2nd Edn.) at page 880 suggests that neither party to a leasing agreement contemplates that the equipment will have more than a nominal value at the end of the lease.

It is not contended by the appellants that entering into an equipment leasing agreement is contracting outside the Hire Purchase Act (Revised) 1978 with its statutory provisions for the protection of hirers and the safeguard of the subject of the hire, which the courts will not sanction. In the same way as parties can agree to take a licence in preference to a lease of premises which would give the protection of the relevant Rent Acts: *Mohd. Mustafa s/o Seeni Mohd.* v. *Kandasami s/o Kaliappa Gounder*,[1] *Demuren* v. *Seal Estates*[2] and *Rossvale* v. *Green*,[3] it is similarly open to the parties to come to an agreement for a lease of equipment rather than to a hire-purchase agreement. To adapt the words of Geoffrey Lane L.J. (as he then was) in *Aldrington Garages* v. *Fielder*[4]: if there is here only a lease of goods and not a hire-purchase dressed up in the verbiage and trappings of a lease, the lessor is entitled to succeed in its action for recovery of possession, arrears of rentals and all the other claims in the agreement. Neither statute nor public policy is against a equipment lease: see also the recent decision of Eusoffe Abdoolcader J. in *Tan Chin Kim Sawmill & Factory Sdn. Bhd. & Anor.* v. *Lindeteves-Jacoberg (M) Sdn. Bhd. & Anor.*[5] In fact equipment leasings confer certain advantages on both lessor and lessee principally in connection with tax reliefs available to both parties and the facility afforded to the lessee to return a piece of equipment which had become obsolete at the end of the minimum period without having to incur liability for payment of its full value and to

replace it: see *Goode* on Hire-Purchase Law and Procedure (2nd Edn.) at pages 881-3.

In the event, the appellants fell into arrears of their payment of the rentals. The respondents actively recovered possession of eight of the nine vehicles; the ninth was surrendered by the appellants to the respondents. The respondents also served a writ on the respondents for arrears of rentals under clause 19(ii)(a) in the sum of $432,663.41 and arrears of rentals for the remainder of the period of the leases under (b) in the sum of $1,022,649.76 and interest. And a little later, the respondents made an Order 14 application to sign final judgment in terms of all the prayers in their writ. The Senior Assistant Registrar thought there were triable issues which would entitle the appellants to unconditional leave to defend. The judge on appeal thought otherwise. The appellants now appeal to this court to restore the decision of the Senior Assistant Registrar.

The defence of the appellants has not been delivered but in an affidavit filed to oppose the Order 14 application, Mr. Koh Kim Chai, a director of the 1st and 2nd appellant companies and an advocate and solicitor, contended that the transactions were in law and in fact hire-purchase agreements which being in breach of the statutory provisions of the Act were unenforceable by the court. What he contended was:

"(a) the parties intended to give and did give the first defendant an option to purchase the said goods as noted in paragraph 5 of a letter containing the arrangements under which the Equipment Lease Agreements were entered, dated the 21st of August 1975 from the plaintiff to the first defendant, a copy of which is annexed hereto and marked 'KKC 1';

(b) the Equipment Lease Agreements had reduced the residual value of the goods at the end of the lease period to $1/- only thereby allowing for the transfer of the said goods to the first defendant at a nominal sum of $1/- only."

The second objection can be easily disposed of. His contention that the residual value at the end of the lease period was $1 could not be true in the light of the recalculation in the variation agreements to which his two companies had subscribed. Neither could he indicate any provision in the documents for a purchase or an option to purchase at this nominal sum or at any other stated or agreed sum. His counsel at the appeal did not pursue the matter and no necessity therefore arises for us to rule on it.

The first objection is rather more substantial. It raises two issues, first, whether the letter referred to is admissible in evidence either as a collateral agreement or for the purpose of construing the lease agreements and secondly whether if admissible and admitted, the provision of an option granted to the appellants to purchase the machines has or has not converted the lease agreements, if not all of them, at least three of them which were referred to therein, into hire-purchases which would call for the operation of the protective provisions of the Hire-Purchase Act. These, in our view, are questions of law. A related problem is the proper construction of the letter for its full term and effect.

The general principle in an Order 14 application is that leave to defend must be given unless it is clear that there is no real substantial question to be tried, that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment: 1960 A.P. 263. Where the question of law raised is a difficult one, leave to defend should be given. But if the point is clear and the court is satisfied that it is really unarguable, leave to defend will be refused: 1976 Supreme Court Practice 140, under the rubric "Question of Law." Therefore if the court is satisfied that the defence or defence objection is unarguable, it must refuse leave to defend; anything short of that must merit unconditional leave to defend.

We now set out the relevant terms of this letter which was dated August 21, 1975 i.e. anterior to any of the 9 lease agreements. The respondents confirmed the following arrangements:

"1. We attach herewith our equipment lease agreements for two (2) units Cat D6C and one (1) unit Cat D7F DD all complete with Carco Winches. The details and terms of the lease are as per the agreements attached. We will deliver the above units by the 27, 28 August, 1975.

....

4. We will hold the price of neither the Cat D6C or the Cat D7F whichever you decide to purchase up till March, 1976 in consideration of your desire to purchase another seven or eight units by then.

5. As agreed, the option to purchase for the machines will be exercised by Syarikat Bunga Raya-Timor Jauh Sendirian Berhad or its assignee."

The purpose of the appellants in seeking to introduce this letter is to contend that the option to purchase makes the leasings hire-purchase agreements and therefore unenforceable by reason of the breaches of the Act.

With respect, we do not think that unenforceability is to be equated with invalidity or illegality so that we do not consider this letter admissible under section 92(a) of the Evidence Act, 1950 to invalidate the agreements or to prove illegality, as contended by Mr. George for the appellants. Neither do we think that there is any latent ambiguity in the "residual value" in the agreements for elucidation under section 92(f) and section 95. We are in doubt whether this letter is admissible under section 92(b) to prove a separate agreement on a matter on which the leasing agreements were silent, since that subsection refers to a separate oral agreement, unless of course the letter is evidence of an oral agreement. But we are of the opinion that it is at least arguable that the entire agreement between the parties consists of two sets of documents, the leasing agreements as varied and the letter, and on this view, they must be read together. We must not however be taken as expressing a firm opinion, as we did not have the benefits of argument but in this possibility of an arguable case, there is in our opinion and with respect a triable issue which necessarily gives the appellants a right to unconditional leave to defend in those cases to which the letter refers.

On a proper construction of the letter in question, it seems to us that the obvious reference to and the enclosure of the three equipment lease agreements, the fixing of the prices of the equipment if the appellants should decide to purchase any in consideration of their intention to purchase other units and the ordinary grammatical meaning to be given to the word

"purchase" must mean that the option to purchase which was given, referred, if at all, to the three vehicles in these three lease agreements and could not refer to the subsequent leasings. No similar offer had been shown by the appellants to have been made in any other document or letter. These later leasings were therefore not qualified by any offer to purchase.

The appeal is therefore allowed in part, to the extent that unconditional leave to defend will be given the appellants, in respect of the three agreements referred to in the letter of August 21, 1975 but the leave to sign final judgment against both appellants in respect of the equipment in the remaining leasing is upheld.

Before leaving the appeal, we have to refer to a notable omission which appeared to have escaped the notice of counsel at the appeal. It concerned the failure of the judge when he allowed the appeal from the Senior Assistant Registrar to deal fully with the Order 14 application. The application was for the whole of the claim, that is, for arrears of rentals and for rentals for the unexpired remainder of the periods of the leases. The judge merely awarded the full sum for past rentals. He did not indicate in his note of the order he made what he proposed in regard to the future rentals. No cross-appeal by the lessors had been lodged or notice of such cross-appeal given: Rules 9(1) and (2) Federal Court (Civil Appeals) (Transitional) Rules, 1963: Neither did they by their counsel ask for the leave of this court to contend that the decision of the High Court should be varied to include the future rentals in respect of the equipment whose leases are not tainted by breaches of the Hire-Purchase Act, or such damages as flowed from the lessees' breach of the agreements.

Insofar as this claim for the rents for the unexpired period of the lease, contractually agreed to in clause 19(ii)(b), *supra*, which the learned judge did not rule on, is concerned, reference may be made to a recent decision of this court, written by Eusoffe Abdoolcader J. in *Diamond Peak Sdn. Bhd. & Anor.* v. *Tweedie.*[6] In that case it has held that when an Order 14 application is dismissed, it does not mean that the statement of claim is struck out and if the court purports to do so, its order is bad and must be set aside. All the court can do where leave to defend is properly to be given is to give such leave and exercise, if it chooses to do so at that stage, its power to give such directions as to the future conduct of the action as might be given under Order 30 Rules of the High Court.

At this stage we do not wish to say anything about the proprietary of the claim for the agreed rentals for the unexpired period of the leases, but Eusoffe Abdoolcader J. dealt with that question in his judgment in the Ipoh High Court Civil Suit No. 137/1977,[5] *supra.*

Both decisions were given on the same day, March 6, 1980. We appreciate of course that they were not available to the Bar when this case was argued in the High Court or known to counsel when it came up before us.

The order of this court therefore is that the leave to the respondents to sign final judgment against both appellants for the arrears of rentals in respect of the six leasings to which the letter of August 21, 1975 does not refer, is confirmed, in such sum as the parties will arrive at from the relevant documents with interest thereon at the agreed rate up to the date of repossession, and in one case, up to the date of return and further interest at 12% p.a. on such arrears from the date of repossession or return as the case may be to the date of payment. The judgment should also include the repossession expenses: clause 19(ii)(c). Leave to defend will be given to the appellants in respect of the three vehicles in the leasing agreements mentioned in the letter of August 21, 1975. This must mean leave to defend also in respect of the rentals for the unexpired period of these 3 leases. The order for costs to the respondents in the High Court and before the Senior Assistant Registrar will stand but the costs of the appeal in this court shall be in the cause.

The application for stay is refused.

Order accordingly.

Solicitors: *Ng Ek Teong & Partners; Skrine & Co.*

UNITED ORIENT LEASING CO. SDN. BHD. v. PERDANA PROPERTIES SDN.

[F.C. (Wan Suleiman, Syed Othman & Ibrahim Manan F.JJ.) January 8 & April 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 218 of 1979]

Practice and Procedure — Execution — Warrant of distress — Claim by owner of goods — Goods leased to tenant — Notice of assumption of goods given by owner — Acknowledgement that goods belong to owner — Distress Ordinance, 1951, ss. 10 & 12.

In this case the Sessions Court at Johore Bahru had levied an execution order against an emporium. A number of refrigerators and other equipments were seized and the appellants claimed that these equipments belonged to them. They gave the emporium notice of assumption of the equipments. Subsequently the respondents took out a warrant of distress in the High Court and distrained the goods already under seizure by the Sessions Court. When this first warrant was discharged, the respondents caused a second warrant of distress to be issued against the emporium. The respondents by their solicitors acknowledged that the equipments belonged to the appellants and requested the Sessions Court to release them to the appellants. The Sessions Court after hearing an objection by the appellants against seizure of the equipments ordered that they be released to the appellants. However, the High Court dismissed the appellant's motion for release of the equipments distrained under the warrant of distress holding in effect that the equipments had been in such situation in the premises of the emporium that the emporium was the reputed owner. The appellants appealed.

Held: (1) on the date when the respondents took out the second warrant of distress they must have been aware of the full circumstances surrounding the equipments. The appellants had given notice of assumption of the equipments and by the notice it must be taken that the appellants as the true owners of the equipment had withdrawn consent and permission of the equipments and were claiming them. The emporium therefore was no longer in such possession of the equipments under such circumstances as to be the still the reputed owner;

(2) the acknowledgement by the solicitors for the respondents must be taken to relate back to the date of the attach-